No. 09-384

In the Supreme Court of the United States

OFFICE OF ALASKA GOVERNOR, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's decision in *United States* v. *Georgia*, 546 U.S. 151 (2006), to hold that the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e-16a *et seq.*, validly abrogated the State's sovereign immunity with respect to Margaret Ward's allegations of retaliatory discharge because such allegations stated a claim under the First Amendment.

2. Whether the court of appeals correctly held that Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA to provide coverage to "State employees" "previously exempt" under Title VII of the Civil Rights Act of 1964.

3. Whether Congress validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment when it extended the protections of Title VII to previously-excluded state employees.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-55a) is reported at 564 F.3d 1062. The panel opinion of the court of appeals (Pet. App. 56a-90a) is reported at 508 F.3d 476. The decision of the United States Equal Employment Opportunity Commission (Pet. App. 91a-99a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. On July 17, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 14, 2009. On September 9, 2009, Justice Kennedy further extended the time to September 28, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071, was enacted "to ensure that all persons enjoy full and adequate protection against employment discrimination." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 2 (1991). The Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e-16a *et seq.*, enacted as part of the Civil Rights Act of 1991, prohibits, *inter alia*, employment discrimination against certain state employees previously excluded from coverage under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[1]

GERA applies to "any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policy-making level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office."

42 U.S.C. 2000e-16c(a). That section is entitled "[c]overage of previously exempt State employees." 42 U.S.C. 2000e-16c.

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[1] The relevant provisions of GERA were originally codified at 2 U.S.C. 1202 and 1220 (Supp. III 1991), but were transferred, as amended, to 42 U.S.C. 2000e-16a *et seq.*

These "previously exempt State employees" are entitled to the "rights, protections, and remedies provided pursuant to section 2000e-16b of this title." 42 U.S.C. 2000e-16c(a). Section 2000e-16b(a)(1), in turn, provides that "[a]ll personnel actions affecting" such state appointees "shall be made free from any discrimination" based on "race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title." 42 U.S.C. 2000e-16b(a)(1). Thus, in defining the "rights" and "protections" afforded to covered state employees, GERA expressly incorporates the standards of 42 U.S.C. 2000e-16, which permits claims of employment discrimination to be brought against the federal government, 42 U.S.C. 2000e-16(c).

As for "remedies," Section 2000e-16b(b) provides that they "may include * * * such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title." 42 U.S.C. 2000e-16b(b)(1). Section 2000e-5(g), in turn, permits "back pay (payable by the employer * * * responsible for the unlawful employment practice)." 42 U.S.C. 2000e-5(g)(1). Section 1981a permits recovery of compensatory damages "against a respondent who engaged in unlawful intentional discrimination." 42 U.S.C. 1981a(a).

Any covered state appointee under GERA may file a complaint with the Equal Employment Opportunity Commission (EEOC), and the agency "shall determine whether a violation has occurred" and, if so, "shall also provide for appropriate relief." 42 U.S.C. 2000e-16c(b)(1). The EEOC, prior to acting on a complaint, must refer it to any state or local fair employ-

ment practices (FEP) agency authorized by state or local law "to grant or seek relief from" the alleged discrimination. 42 U.S.C. 2000e-5(d) (incorporated by 42 U.S.C. 2000e-16c(b)(2)(A)). And, upon request by the State or local agency, the EEOC must provide that agency "a reasonable time, but not less than sixty days * * * to act under such State or local law to remedy the practice alleged." *Ibid.* (incorporated by 42 U.S.C. 2000e-16c(b)(2)(A)).

Any party aggrieved by an EEOC final order under GERA may petition the court of appeals for review under the Hobbs Act, 28 U.S.C. 158. 42 U.S.C. 2000e-16c(c).

2. This action arose out of discrimination complaints filed with the EEOC in April 1994, by Lydia Jones and Margaret Ward against petitioner, the Office of the Alaska Governor.[2] Pet. App. 2a, 91a. Jones and Ward were employed by the former Governor of Alaska, Walter Hickel, and were terminated under disputed circumstances. *Ibid.* Ward served as Director of the Governor's Anchorage office; Jones was a Special Staff Assistant in that office. *Id.* at 92a. The EEOC processed both complaints under GERA.[3] *Id.* at 91a-92a.

Jones alleged that the State paid her less due to her sex and race, that she was sexually harassed by another

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[2] Jones died while the case was pending before the EEOC. Her husband, proceeding pro se, sought to pursue the claims on her behalf before the administrative law judge, but did not intervene in the Ninth Circuit appeal. Gov't C.A. Br. 2 n.2.

[3] Ward argued that she was entitled to coverage under Title VII, not GERA, because she was not "a policy maker and did not have a close confidential relationship with the Governor." Pet. App. 103a. The administrative law judge reserved ruling on the appropriate statutory framework. *Id.* at 115a.

Special Staff Assistant, and that the State discharged her in retaliation for complaints of such discriminatory harassment. Pet. App. 122a; C.A. E.R. 9, 29-30. Ward alleged that she was discriminated against due to her sex, and that the State terminated her employment in retaliation for supporting Jones's harassment complaint. Pet. App. 101a; C.A. E.R. 4, 16.

The EEOC referred the complaints to an administrative law judge (ALJ). The State filed motions for summary decision asserting abatement of Jones's claims after her death, laches, and Eleventh Amendment immunity, and seeking dismissal of Ward's and Jones's retaliation claims on their merits. Pet. App. 102a, 123a-124a. The ALJ denied the State's motions in their entirety after concluding that he lacked jurisdiction to decide the sovereign immunity issue, and that there were material factual disputes that could not be properly resolved "in these early proceedings." *Id.* at 100a-115a, 121a-133a. The ALJ certified an interlocutory appeal to the EEOC on, *inter alia*, the Eleventh Amendment immunity issue; petitioner did not seek and the ALJ did not certify interlocutory review on the merits of the retaliation claims. *Id.* at 116a-120a, 134a-137a. The EEOC declined to entertain the interlocutory appeals and remanded for a hearing. *Id.* at 91a-99a. That hearing has not yet occurred and the EEOC has not yet addressed the merits of Ward's and Jones's claims.

The proceedings before the ALJ were suspended because Alaska filed a petition for review in the court of appeals alleging Eleventh Amendment immunity from suit. Pet. App. 2a.

3. The court of appeals deemed the denial of Eleventh Amendment immunity to be an appealable collateral order and exercised jurisdiction over the interlocu-

tory appeal. Pet. App. 59a. On November 8, 2007, in a split decision, the court of appeals held that GERA did not validly abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.* at 56a-90a. The court did not dispute that Congress clearly expressed its intent to abrogate state sovereign immunity. See *id.* at 60a. Instead, Judge Noonan, writing for the court, concluded that Congress made no specific findings with respect to discrimination by states against high-level employees and, for that reason, GERA was not "a proportionate response to a widespread evil." *Id.* at 65a. Judge Wallace concurred. *Id.* at 65a-68a.

In dissent, Judge Paez had "no serious doubt" that Congress expressed its unequivocal intent in GERA to abrogate state sovereign immunity, and concluded that such abrogation was a valid exercise of Congress's authority under the Fourteenth Amendment. Pet. App. 68a-90a.

4. The court of appeals granted rehearing en banc, held that Congress validly abrogated the State's sovereign immunity in GERA with respect to the particular claims at issue in this case, and remanded for further proceedings. Pet. App. 1a-55a.

a. In his opinion for the court, Chief Judge Kozinski, joined by six other judges, held that Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA. Pet. App. 4a-7a. Looking to the statutory text, the court concluded that "GERA expressly covers state employees, and expressly gives them a right to collect damages 'payable *by the employer*'—the state." *Id.* at 5a (quoting 42 U.S.C. 2000e-5(g)(1)).

The court then held that GERA was a proper exercise of Congress's power under Section 5 of the Four-

teenth Amendment under *United States* v. *Georgia*, 546 U.S. 151 (2006), because all of the alleged GERA claims in this case encompassed actual violations of the Fourteenth Amendment. Pet. App. 8a. Recognizing that "[t]he merits of these claims (and Alaska's various defenses) aren't before us," the court "consider[ed] only whether each claim alleges conduct that, if it occurred and wasn't justified by a valid defense, would have violated the Fourteenth Amendment." *Id.* at 8a-9a.

First, the court held that "[t]he alleged pay discrimination, if it happened, denied Jones and Ward equal protection of the law." Pet. App. 9a. *Second*, the court construed Jones's sexual harassment claim to allege intentional discrimination by the State and, as such, concluded it also stated a claim for violation of her equal protection rights. *Id.* at 10a-12a. *Third*, the court held that Ward's retaliation allegations stated a claim under the First Amendment, as incorporated into the Due Process Clause of the Fourteenth Amendment. *Id.* at 12a-15a. Based on Ward's allegations, the court found that she was speaking as a private citizen on a matter of public concern when she "held a press conference to protest what she saw as sex discrimination in the Governor's Office." *Id.* at 14a. The court did not opine on "[w]hether Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest," nor did it decide whether Ward could prevail on such a hypothetical First Amendment claim—or even whether she could prevail on the merits of her GERA retaliation claim. *Id.* at 15a n.7; see also *id.* at 12a n.6 (acknowledging that "Ward is not seeking relief directly under the First Amendment," and leaving it to the EEOC "in the first instance" to decide whether she could succeed on her retaliation claim under GERA).

Because "[e]ach of Jones and Ward's claims allege actual violations of the Fourteenth Amendment," the court held that Congress had validly abrogated the State's sovereign immunity with respect to the claims at issue in this case, rendering it unnecessary to determine whether GERA was valid prophylactic legislation. Pet. App. 16a.

b. Judge O'Scannlain concurred in part and dissented in part. Pet. App. 16a-33a. He agreed with the majority that the sex discrimination claims stated violations of the Equal Protection Clause. *Id.* at 16a. Judge O'Scannlain also agreed that Congress's intent to abrogate state sovereign immunity in GERA was sufficiently clear. *Id.* at 17a. In his view, however, Ward's retaliation claim did not allege a First Amendment violation. *Id.* at 21a-28a. Judge O'Scannlain would have ruled that the decision to discharge Ward after she presented "one side of an internal struggle among the Governor's policy aides" at a press conference was "a classic employment decision of the kind [this] Court has warned should not bec[o]me a constitutional matter." *Id.* at 26a-27a (second set of brackets in original; internal quotation marks and citation omitted).

Judge O'Scannlain then analyzed whether GERA is valid prophylactic legislation that is congruent and proportional to the harm Congress intended to prevent, and concluded that because Congress did not document a "pattern of unconstitutional discrimination at the policy-making level of state and local employment," it was not. Pet. App. 28a-33a.

c. Judge Ikuta, joined by two other judges, dissented on the ground that Congress had not unequivocally expressed its intent to abrogate state sovereign immunity in enacting GERA. Pet. App. 33a-55a. The

dissent would have held that GERA does not contain the requisite clear statement of congressional intent because it does not "explicitly provide that it intends to abrogate state sovereign (or Eleventh Amendment) immunity" in so many words,"it does not specify states as potential defendants," and it does not "create a statutory scheme under which states are the only possible defendants." *Id.* at 34a, 39a-41a.

ARGUMENT

Petitioner argues that this Court should grant certiorari on the three questions presented because of perceived conflicts with this Court's decisions and, with respect to the First Amendment holding, other courts of appeals, and because of overarching federalism concerns. This case comes to the Court in an interlocutory posture and on an undeveloped factual record. The State will appear before the EEOC to defend the equal pay and sexual harassment charges regardless of how the first and third questions presented are resolved. And the second question presented is one of first impression that has given rise to no conflict and was correctly decided. This case presents a remarkably unsuitable vehicle to resolve any confusion over this Court's recent decision in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), and this appears to be the first and only court case since 1991 to challenge the abrogation of state sovereign immunity under GERA. Further review is not warranted at this time.

1. The only question that would dispose of the entire case if decided in petitioner's favor, and thus truly immunize the State from suit, is the second question presented: whether Congress unequivocally expressed its intent to abrogate state sovereign immunity in enacting

GERA. The en banc court's holding on that issue is correct and does not conflict with any decision of this Court or any other court of appeals.

a. This case marks the first time a court has considered whether Congress abrogated state sovereign immunity in enacting GERA in 1991. Thus, in the nearly two decades that followed its passage, no other court of appeals has opined on whether GERA clearly and unequivocally expresses Congress's intent to abrogate state sovereign immunity. Indeed, the panel majority below did not address the clear statement issue, nor did petitioner squarely raise it.[4] Unlike the other Eleventh Amendment cases this Court has granted in recent years, this issue has engendered virtually no litigation and there is no conflict to resolve. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 725-726 (2003) (granting certiorari to resolve conflict); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 363 (2001) (same); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 72 (2000) (same); *Dellmuth* v. *Muth*, 491 U.S. 223, 227 (1989) (same); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 237 (1985) (*Atascadero*) (same). In these circumstances, further percolation is warranted.

b. The en banc court of appeals correctly held that Congress "unequivocally expressed its intent," *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004) (quoting *Kimel*, 528

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[4] In its brief before the Ninth Circuit panel (Pet. C.A. Br. 27-28), petitioner appeared to confuse the requirement that Congress demonstrate a clear intent to abrogate state sovereign immunity with the "congruence and proportionality" test under *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Nowhere in its panel or rehearing briefs did petitioner cite *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), or *Dellmuth* v. *Muth*, 491 U.S. 223 (1989), the precedent petitioner now contends the court of appeals' decision "defies." Pet. 24-25.

U.S. at 73), to abrogate state sovereign immunity in enacting GERA. Pet. App. 4a-7a; see *id.* at 17a (O'Scannlain, J., concurring); *id.* at 68a-90a (Paez, J., dissenting) (panel opinion).

Section 2000e-16c is entitled "[c]overage of previously exempt State employees," and extends protection to three categories of employees excluded from Title VII coverage, importing the exclusions almost verbatim. Compare 42 U.S.C. 2000e-16c (employees covered under GERA), with 42 U.S.C. 2000e(f) (employees excluded under Title VII); see also *Board of County Comm'rs* v. *United States EEOC*, 405 F.3d 840, 844 (10th Cir. 2005) (by "echo[ing] the exclusionary language of Title VII," Congress "specifically extend[ed] protections against discrimination * * * to previously exempt high-level state employees"). The newly covered employees are select individuals "chosen or appointed, by a person elected to public office in any State or political subdivision of any State." 42 U.S.C. 2000e-16c(a). GERA thus unequivocally expresses an intent to cover employees "chosen or appointed, by a person elected to public office" in a "State," *i.e.*, state political appointees.

GERA affords these state political appointees the "rights, protections, and remedies provided pursuant to section 2000e-16b of this title." 42 U.S.C. 2000e-16c(a). Those "rights" and "protections" include "personnel actions" "made free from any discrimination" based on "race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title." 42 U.S.C. 2000e-16b(a)(1). GERA further provides that covered state political appointees may file a complaint alleging such "a violation" with the EEOC, 42 U.S.C. 2000e-16c(b)(1), and authorizes the agency to award "remedies as would be appropriate if awarded under

section[] 2000e-5(g)," 42 U.S.C. 2000e-16b(b)(1), including "back pay (payable by the *employer* * * * responsible for the unlawful employment practice)," 42 U.S.C. 2000e-5(g) (emphasis added). And it authorizes the EEOC to award "such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title," 42 U.S.C. 2000e-16b(b)(1), *i.e.*, recovery of compensatory damages "against a *respondent* who engaged in unlawful intentional discrimination," 42 U.S.C. 1981a(a) (emphasis added).

Where the complainant is a state political appointee, the only "employer" "responsible for the unlawful employment practice" and available to pay back pay, and the only "respondent" who could have "engaged in unlawful intentional discrimination" and who is eligible to pay compensatory damages, is the State.[5] See Pet. App. 5a, 7a. As the court of appeals held, "GERA expressly covers state employees, and expressly gives them a right to collect damages 'payable *by the employer*'—the state." *Id.* at 5a (quoting 42 U.S.C. 2000e-5(g)(1)).

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[5] Although individual state officials could technically be defendants to such a suit, at the time Congress enacted GERA it was clear that "backpay as such cannot be awarded against a defendant in his or her individual capacity." *Negrón-Almeda* v. *Santiago*, 528 F.3d 15, 26 (1st Cir. 2008) (citing pre-GERA cases). Thus, by providing for "back pay" "payable by the employer," Congress was authorizing back pay from the State. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 & n.8 (1976) (suit against state officials for back pay under Title VII indistinguishable from damages suit against State for Eleventh Amendment purposes). Moreover, the courts of appeals have generally agreed that employees cannot be held liable in their individual capacity under Title VII, the remedial provisions of which are incorporated into GERA. See Pet. App. 74a-75a (Paez, J., dissenting) (panel opinion) (collecting cases).

Thus, when Congress expressly provided that state employees could obtain remedies, including damages, for violations of the statute—violations that could only be committed by state employers—it unequivocally waived state sovereign immunity. "Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages." *Kimel*, 528 U.S. at 74.

c. Petitioner argues to the contrary for three reasons, none of which withstands scrutiny or warrants further review of the decision below.

Petitioner first argues (Pet. 20-21) that "this Court's precedents have required Congress to take one of three paths" to abrogate state sovereign immunity by: (1) expressly providing that it is abrogating Eleventh Amendment immunity; (2) creating a statutory scheme in which states are the only possible defendants; or (3) "specifically defin[ing] States as potential defendants who are subject to suit." That is the same argument made by the dissenting judges, Pet. App. 39a-42a, but this Court's precedents have "required" no such thing. These three means of abrogation may be one way of categorizing the Eleventh Amendment cases previously decided, but this Court has never articulated these as "paths," let alone suggested that they were "required" and exclusive. This Court's precedent requires only that Congress clearly express its intent to abrogate state sovereign immunity in the statutory text, *Kimel*, 528 U.S. at 73-74, a standard GERA satisfies, see pp. 11-13, *supra*.

In any case, states are "the only possible defendants" when the complaining party is a covered state employee seeking back pay. See pp. 12-13, *supra*. And, through incorporation of Title VII provisions, GERA does define States as potential defendants. *Fitzpatrick* v. *Bitzer*,

427 U.S. 445 (1976), which petitioner does not cite, found the "'threshold fact of congressional authorization' to sue the State as employer" to be "clearly present" in Title VII. *Id.* at 448-449 & n.2 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974)); see also *Hibbs*, 538 U.S. at 729-730. This Court held that Congress unequivocally abrogated state sovereign immunity when it amended the definition of "person" to include "governments, governmental agencies, [and] political subdivisions" (42 U.S.C. 2000e(a)); removed the express exclusion of States from the definition of "employer" (42 U.S.C. 2000e(b)); and amended the definition of "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision" (42 U.S.C. 2000e(f)). *Fitzpatrick*, 427 U.S. at 449 n.2. By extending coverage to "previously exempt [from Title VII] State employees," 42 U.S.C. 2000e-16c, and by otherwise incorporating Title VII provisions, *e.g.*, 42 U.S.C. 2000e-16b(b)(1) (permitting recovery under Title VII's provision permitting back pay "payable by the employer"), Congress's intent to abrogate state sovereign immunity in enacting GERA is particularly clear.

Petitioner next contends that Congress could not have intended to abrogate state sovereign immunity in GERA because "[t]here is no indication that, at the time GERA was enacted, Congress regarded GERA's administrative enforcement scheme"—*i.e.*, proceedings before the EEOC followed by judicial review in which the United States is necessarily a party respondent—"as implicating the States' sovereign immunity." Pet. 23. In other words, Congress could not have "anticipated this Court's decision in *Federal Maritime Commission* [v. *South Carolina State Ports Authority*, 535 U.S. 743

(2002) (*Federal Maritime Commission*)]." Pet. 23. That extra-textual argument is misplaced.

The relevant inquiry under the clear statement rule is not whether Congress anticipated the *Federal Maritime Commission* decision, but whether Congress unequivocally intended to subject States to EEOC administrative proceedings. See, *e.g.*, *Kimel*, 528 U.S. at 76 ("The clear statement inquiry focuses on *what* Congress did enact, not *when* it did so."); *Dellmuth*, 491 U.S. at 239 (Brennan, J., dissenting) (observing that the majority's clear statement rule did not exist at the time Congress enacted the challenged statute). And, as petitioner implicitly concedes, Congress did intend States to be defendants in *EEOC proceedings* brought by covered state employees. Pet. 23 (contending that Congress created an administrative review scheme that "ensured * * * States would *not* be subject to suit in federal court at the behest of private individuals"); Pet. 24 ("Congress sought to avoid the necessity of abrogating immunity by foreclosing direct judicial enforcement without the presence of the United States as a party.").

Moreover, in *Federal Maritime Commission*, this Court simply engaged in common law adjudication; it did not announce new law. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 535-536 (1991) (noting the "declaratory theory of law, according to which the courts are understood only to find the law, not to make it") (citations omitted); *id.* at 549 (Scalia, J., concurring). That this Court could not "imagine" that the Framers "would have found it acceptable to compel a State to" "be required to answer the complaints of private parties * * * before the administrative tribunal of an agency," *Federal Mar. Comm'n*, 535 U.S. at 760, strongly suggests that Congress could have foreseen this result.

Indeed, in the seven years since *Federal Maritime Commission* was decided, Congress has not acted to amend GERA to restrict suits against States.

Finally, petitioner asserts (Pet. 24-25) that GERA is more like the statutes at issue in *Atascadero* and *Dellmuth*, than those at issue in *Kimel* and *Hibbs*. That argument is mistaken.

In *Atascadero*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, provided a cause of action against "*any* recipient of Federal assistance." 473 U.S. at 245. The Court observed that although States received federal assistance, "given their constitutional role," they "are not like any other class of recipients of federal aid," and thus "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246. In *Dellmuth*, this Court concluded that a provision of the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*, permitting parties aggrieved by the statutorily-prescribed administrative process "to 'bring a civil action * * * in a district court'" was a "general authorization for suit in federal court" which was not sufficiently clear to abrogate state Eleventh Amendment immunity. 491 U.S. at 228-231 (quoting 20 U.S.C. 1415(e)(2) (1988) and *Atascadero*, 473 U.S. at 246).[6]

In contrast, this Court found Congress's intent "unmistakably clear" where the Age Discrimination in Em-

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[6] Shortly after each decision, both *Atascadero* and *Dellmuth* were superseded by statute. See 42 U.S.C. 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."); 20 U.S.C. 1403(a) ("A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.").

ployment Act of 1967 (ADEA), 29 U.S.C. 626(b), directed that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in section[] * * * 216" of the Fair Labor Standards Act of 1938 (FSLA), 29 U.S.C. 216. Section 216(b), in turn, authorized employee actions for back pay "against any employer (including a public agency)," 29 U.S.C. 216(b), and Section 203(x) defined "public agency" as including both "the government of a State or political subdivision thereof" and "any agency of * * * a State or political subdivision of a State," 29 U.S.C. 203(x). *Kimel*, 528 U.S. at 73-74. And, in *Hibbs*, this Court found Congress's intent "not fairly debatable" where the Family and Medical Leave Act of 1993 (FMLA) authorized suit "against any employer (including a public agency)," 29 U.S.C. 2617(a)(2), and defined "employer" to include "any 'public agency' as defined in section 203(x) of this title," 29 U.S.C. 2611(4)(A)(iii), which, in turn, defined "public agency" as including both "the government of a State or political subdivision thereof" and "any agency of . . . a State or political subdivision of a State." *Hibbs*, 538 U.S. at 726 (quoting 29 U.S.C. 203(x)).

As detailed above (see pp. 11-13, *supra*), the provisions of GERA are far more specific than the general authorizations in *Atascadero* and *Dellmuth*, the States are the *only* possible defendants where the complainant before the EEOC is a covered state employee, and GERA expressly incorporates provisions of Title VII which clearly abrogate state sovereign immunity per *Fitzpatrick*. Absent a conflict, further review is not warranted.

2. To validly abrogate state sovereign immunity, Congress must also "act[] pursuant to a valid grant of constitutional authority." *Lane*, 541 U.S. at 517 (quoting

Kimel, 528 U.S. at 73). As this Court recently held in *United States* v. *Georgia*, 546 U.S. 151 (2006), "no one doubts" that Congress has the power to "'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions," and that "[t]his enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States." *Id.* at 158-159. Thus, under *Georgia*, "insofar as [GERA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, [GERA] validly abrogates state sovereign immunity." *Id.* at 159.

In this case, the court of appeals held that Jones and Ward asserted GERA claims that, in substance, alleged violations of the Fourteenth Amendment and, thus, abrogation was valid under *Georgia*. Petitioner does not dispute that holding with respect to the equal pay or sexual harassment claims. It only seeks further review with respect to Ward's claim that the State retaliated against her for publicly supporting Jones's sexual harassment complaint. In that regard, petitioner argues (Pet. 11-19) that the court of appeals erred in holding that Ward's GERA retaliation claim also sounded in the First Amendment, and urges this Court to grant certiorari to resolve the conflict and confusion that has purportedly developed in the three years since *Garcetti* v. *Ceballos*, *supra*, was decided. This case is an unsuitable vehicle to resolve any purported conflict.

a. In *Garcetti*, this Court held that to be protected under the First Amendment, a public employee must have "spoke[n] as a citizen on a matter of public concern," and "that when [a] public employee[] make[s] statements pursuant to [her] official duties," she is not

"speaking as [a] citizen[] for First Amendment purposes." 547 U.S. at 418, 421. If an employee does speak as a citizen on a matter of public concern, the court proceeds to a second inquiry, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* at 418.

"[C]onducting these inquiries sometimes has proved difficult," and such difficulty "is the necessary product of 'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.'" *Garcetti*, 547 U.S. at 418 (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 569 (1968)). These inquiries often involve contested factual issues that can be resolved only upon review of the record developed below. See, *e.g.*, *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242-243 (3d Cir. 2006) (reversing dismissal of public employee's First Amendment retaliation claim because "procedural posture" precluded the appellate court from examining "the content, form, and context of [the] statement, as revealed by the whole record") (brackets in original; citation omitted); *Foraker* v. *Chaffinch*, 501 F.3d 231, 240-241 (3d Cir. 2007) ("proper resolution of challenges to the designation of" speech as within a plaintiff's job duties under *Garcetti* "is to defer to the district court, because * * * '[it] may be in a better position to make the relevant factual determinations'") (brackets in original) (quoting *Freitag* v. *Ayers*, 468 F.3d 528, 546 (9th Cir. 2006), cert. denied, 549 U.S. 1323 (2007)).

The record here is particularly ill-suited for this Court's review. Unlike every other case petitioner cites including *Garcetti*, this case presents no First Amend-

ment claim. Neither Ward nor Jones ever alleged that the Governor's Office retaliated against her in violation of the First Amendment; they alleged retaliation under GERA only. See Pet. App. 12a n.6. The First Amendment inquiry was a product of the sovereign immunity dispute, which led the en banc court of appeals to examine whether the GERA allegations could also state a claim under the First Amendment.

Thus, no agency or lower court has ever reached the merits of the hypothetical First Amendment claim—much less rendered a final judgment on that claim. Nor did the court of appeals itself decide whether Ward could ultimately prevail under the First Amendment, or whether, for example, "Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest." Pet. App. 15a n.7. Indeed, the EEOC has not yet adjudicated the merits of Ward's GERA retaliation claim, *id.* at 12a n.6, let alone any (non-existent) First Amendment claim, and the ALJ determined that factual disputes among the parties could not be resolved "in these early proceedings," *id.* at 109a-111a.

In marked contrast, all of the cases cited by petitioner as purportedly in conflict with the court of appeals decision below (Pet. 14-15), involved plaintiffs that actually alleged First Amendment violations and courts that actually rendered a *final* judgment on that First Amendment claim. See *Gorum* v. *Sessoms*, 561 F.3d 179 (3d Cir. 2009) (affirming summary judgment on First Amendment retaliation claim); *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) (same); *Foraker*, *supra* (affirming judgment as a matter of law after jury verdict on First Amendment retaliation claim); see also, *e.g.*, *Thomas* v. *City of Blanchard*, 548

F.3d 1317 (10th Cir. 2008) (reversing summary judgment and remanding for trial on First Amendment retaliation claim); *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007) (reversing denial of judgment as a matter of law after jury trial and remanding for new trial on First Amendment retaliation claim), cert. denied, 128 S. Ct. 905, and 128 S. Ct. 931 (2008); *Battle* v. *Board of Regents*, 468 F.3d 755 (11th Cir. 2006) (affirming grant of summary judgment on First Amendment retaliation claim).[7]

A true First Amendment case arising from a developed record after final judgment would be a far more suitable vehicle to consider any purported confusion among the courts of appeals in the wake of *Garcetti*.[8] Indeed, as petitioner notes (Pet. 16-17 n.3), there have been (and presumably will continue to be) a number of petitions for certiorari asking the Court to decide this precise question. There is no reason to reach out to de-

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[7] Petitioner also cites *Greenwell* v. *Parsley*, 541 F.3d 401 (6th Cir. 2008), cert. denied, 130 S. Ct. 64 (2009), but that case involved the First Amendment right "to run for political office," *id.* at 402, and does not mention *Garcetti*. In any case, the court of appeals affirmed summary judgment. *Id.* at 404.

[8] Given the fact-intensive nature of the First Amendment inquiry under *Garcetti*, it is unclear to what extent a circuit split or "confusion" (Pet. 15) among the circuits truly exists. In *Fairley* v. *Andrews*, 578 F.3d 518 (7th Cir. 2009), the Seventh Circuit did "disapprove *Alaska* v. *EEOC* to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer." *Id.* at 523. But the decision below did not rest on such grounds. Rather, the court merely found that Ward's "press conference to protest what she saw as sex discrimination in the Governor's Office" was not part of her official duties. Pet. App. 14a. In any event, to the extent there is disagreement among the circuits regarding application of *Garcetti*, this case is not the vehicle to resolve it.

cide important questions of constitutional law under the First Amendment where, as here, the en banc court of appeals was the first and only adjudicator to address (but not conclusively decide) a hypothetical First Amendment claim.

b. The interlocutory posture of the present case also counsels against granting certiorari on the First Amendment issue.

This Court generally does not grant review of interlocutory decisions because further proceedings may render the relief sought unnecessary. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."), with *United States* v. *Virginia*, 518 U.S. 515, 526, 530 (1996) (review granted after final judgment).

Further proceedings here could obviate any need for this Court to rule on the First Amendment question. On remand to the EEOC, Alaska could prevail on the merits of Ward's GERA retaliation claim (*e.g.*, by showing that Ward failed to make out a prima facie case, or by proving a legitimate, non-discriminatory reason for the termination, Pet. App. 102a), or it could prevail on its laches defense, *ibid.* See *id.* at 98a (EEOC declined to review ALJ's finding that "there are genuine issues of material fact, relating to the laches defense"); *id.* at 109a-111a (ALJ found disputed issues of fact requiring trial on GERA retaliation claim—an issue that was not certified for interlocutory appeal to the EEOC, *id.* at 116a-120a).

Although a State's claim of Eleventh Amendment immunity often warrants an exception to the general

rule against interlocutory review, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-147 (1993), that is not the case here. The reason for the exception is that, generally speaking, a ruling in the State's favor on the Eleventh Amendment question would afford the State immunity from suit in its entirety. *Id.* at 143-144 (purpose of allowing immediate appeal is to "avoid[] the costs and general consequences of subjecting [states] to the risks of discovery and trial"); cf. *Federal Mar. Comm'n*, 535 U.S. at 766 (purpose of sovereign immunity is to "provide[] an immunity from suit"). A ruling in petitioner's favor on the First Amendment question, however, would not confer the benefits interlocutory review is designed to provide.

As noted above (see pp. 7, 18, *supra*), the court of appeals ruled that the pay discrimination claims were based on conduct that would independently violate the Equal Protection Clause, as was the sexual harassment claim. Pet. App. 9a-11a. Relying on this Court's decision in *Georgia*, *supra*, the court of appeals held that Congress had validly abrogated state sovereign immunity with respect to those claims. Petitioner does not challenge that holding. Thus, unless petitioner prevails on its clear statement argument (see pp. 9-17, *supra*), it *will* be required to defend the GERA claims before the EEOC on remand and will *not* be immune from suit. There is no reason to grant certiorari in an interlocutory posture to resolve a factbound constitutional issue when the State will be subject to suit before the EEOC regardless.

This Court confronted a similar situation in *Georgia* itself. There, the State did not dispute that the prisoner had "alleged actual violations of the Eighth Amendment," nor did it challenge the prisoner's suggestion

that the same conduct also alleged violations of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* *Georgia*, 546 U.S. at 157. After determining that Congress validly abrogated state sovereign immunity with respect to claims based on conduct that independently violated the Fourteenth Amendment, this Court remanded for the lower courts to determine "on a claim-by-claim basis" (1) whether the State's alleged conduct violated the statute, (2) whether such alleged conduct also violated the Fourteenth Amendment, and (3) to the extent such alleged conduct violated the statute but not the Constitution, "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* at 159; see *Buchanan* v. *Maine*, 469 F.3d 158, 172-173 & n.8 (1st Cir. 2006). Awaiting final judgment in these circumstances does not unduly threaten the State's sovereign interests.

c. Petitioner asserts (Pet. 11, 17-19) that the court of appeals' First Amendment ruling implicates "profound" issues of federalism independently warranting review. But the court of appeals did not rule on the merits of Ward's retaliation claim under the First Amendment. Pet. App. 14a n.7. Indeed, it never reached the second part of the First Amendment inquiry under *Garcetti*—*i.e.*, whether the State "had an adequate justification for treating the employee differently from any other member of the general public." 547 U.S. at 418; see Pet. App. 15a n.7 ("Whether Ward's disloyalty and disruption of the office provided a valid basis for firing her and outweighed her speech interest is not at issue here."). This case, therefore, does not foreclose the "ability of the States' highest officials to conduct their affairs and to obtain reliable advice from advisors of their own choos-

ing." Pet. 11; cf. *Davis* v. *Passman*, 442 U.S. 228 (1979) (permitting *Bivens* action charging sex discrimination by congressman to proceed where plaintiff was high-level congressional staffer).

Petitioner also relies heavily on *Cheney* v. *United States District Court*, 542 U.S. 367 (2004) (Pet. 11, 17), and *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (Pet. 18, 20, 24, 27, 28). Both cases are inapposite. *Cheney* involved a judicial discovery order directed at a sitting Vice President personally, as well as separation-of-powers concerns that are not present here. 542 U.S. at 381, 390. *Gregory* considered whether state court judges fell under the ADEA exception for "appointee[s] on the policymaking level," and imposed a clear statement rule in the Tenth Amendment context. 501 U.S. at 467. The principle of state sovereignty is, however, "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Hibbs*, 538 U.S. at 727 (quoting *Fitzpatrick*, 427 U.S. at 456), and neither case suggests that this Court should intervene in an interlocutory posture to decide a fact-specific constitutional question that will, in any case, not immunize the State from further proceedings before the EEOC on remand.

3. Reversal of the court of appeals' decision on First Amendment grounds would not afford petitioner relief for another reason: Congress validly abrogated state sovereign immunity in enacting GERA, whether or not the underlying claims sound in the Fourteenth Amendment. That question, however, was not addressed by the en banc majority and has not been considered by any other court of appeals. Review is not independently warranted.

a. To be valid under Section 5, legislation "must exhibit congruence and proportionality between the injury

to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. at 728 (internal quotation marks and citation omitted).

At the time GERA was enacted, it was well-settled that Title VII validly abrogated state sovereign immunity. *Fitzpatrick*, *supra*; see *Hibbs*, 538 U.S. at 729-730; *id.* at 758 (Kennedy, J., dissenting) ("[T]he abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment."). Like Title VII, the challenged sections of GERA are directed at the central Fourteenth Amendment end of preventing state employment discrimination on the basis of race and sex. By extending the protections of Title VII to previously-excluded state employees, GERA was "the last step in the sequence of broadening Title VII to provide protections to state employees, the intermediate steps of which were explicitly stated by Congress to be based on its Fourteenth Amendment powers." *Board of County Comm'rs*, 405 F.3d at 849.

As this Court explained in *Hibbs*:

> Congress responded to [the history of gender discrimination in employment] by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, and we sustained this abrogation in *Fitzpatrick*. But state gender discrimination did not cease. * * * "[W]omen still face pervasive, although at times more subtle discrimination . . . in the job market." [And], [a]ccording to evidence that was before Congress when it enacted the FMLA [in 1993], States continue to rely on invalid gender stereotypes in the employment context.

538 U.S. at 729-730 (citations omitted); see also *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997) (observing that this Court has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"). Just as the "persistence of such unconstitutional [gender] discrimination by the States justifie[d] Congress' passage of prophylactic § 5 legislation," *Hibbs*, 538 U.S. at 730, in the form of Title VII (*Fitzpatrick*), and the FMLA (*Hibbs*), it also justified Congress's passage of GERA.

The remedies provided in GERA are congruent with and in proportion to the Fourteenth Amendment violations that Congress intended to remedy or prevent. GERA does not require employers to provide any substantive benefit to employees; it merely incorporates the make-whole remedies that are available in Title VII actions against the federal government under Section 2000e-16. Punitive damages are not available against state employers. 42 U.S.C. 2000e-16b(b)(3). Compensatory damages are available only against employers who "engaged in unlawful intentional discrimination," 42 U.S.C. 1981a(a)(1), 2000e-16b(b)(1), and Congress capped liability for such damages at between $50,000 and $300,000, depending on the size of the employer. 42 U.S.C. 1981a(b)(3).

b. Petitioner contends (Pet. 26-27) that abrogation was invalid because, in enacting GERA, Congress failed to create an adequate legislative record detailing a pattern and practice of discrimination against state employees at the policy-making level. That argument is without merit.

This Court has never invalidated, under the congruence-and-proportionality standard, a statute securing rights that this Court's decisions recognize as entitled to heightened protection. Compare, *e.g.*, *Lane*, 541 U.S. at 528-529 (access to courts), *Hibbs*, 538 U.S. at 735 (gender discrimination), and *Fitzpatrick*, *supra* (race and gender discrimination), with *Garrett*, 531 U.S. at 368-372 (disability discrimination), and *Kimel*, 528 U.S. at 89-91 (age discrimination). When a statute targets suspect classifications, "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. In contrast, where Congress targets non-suspect classifications, it "must identify, not just the existence of" discriminatory treatment, but the existence of *unconstitutional* treatment which, applying rational basis review, requires "a 'widespread pattern' of irrational reliance on such [non-suspect classifications]." *Hibbs*, 538 U.S. at 735 (quoting *Kimel*, 528 U.S. at 90).

The purpose of the congruence-and-proportionality test is to "distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue.'" *Hibbs*, 538 U.S. at 728 (quoting *Kimel*, 528 U.S. at 81); *Kimel*, 528 U.S. at 88 (ADEA sought to "effectively elevate[] the standard for analyzing age discrimination to heightened scrutiny"). Legislation fails that test when it targets conduct that does not have "a significant likelihood of being unconstitutional," *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 643-648 (1999) (quoting *City of Boerne*, 521 U.S. at 532), and when the legislation could not "be understood as responsive to, or designed to prevent, *unconstitutional* behav-

ior," *Kimel*, 528 U.S. at 86 (emphasis added) (quoting *City of Boerne*, 521 U.S. at 532). See also *Garrett*, 531 U.S. at 368 (noting failure to demonstrate "history and pattern of *unconstitutional* employment discrimination by the States against the disabled") (emphasis added). In other words, statutes that prohibit "substantially more state * * * decisions and practices than would likely be held unconstitutional under the applicable * * * rational basis standard," *Kimel*, 528 U.S. at 86, are not a valid exercise of Congress's authority under Section 5.

There is no such concern here. In Section 2000e-16b(a)(1), Congress targeted classifications based on race, sex, religion, color or national origin which are subject to strict or heightened scrutiny. *E.g.*, *Johnson* v. *California*, 543 U.S. 499, 505 (2005); *Virginia*, 518 U.S. at 532-533. GERA was enacted as part of the Civil Rights Act of 1991, a statute that Congress found "necessary to provide additional protections against unlawful discrimination in employment," 1991 Act § 2(3), 105 Stat. 1071, and as the "last step" in "broadening Title VII to provide protections to state employees," *Board of County Comm'rs*, 405 F.3d at 849. And Congress enacted GERA at a time when states continued to engage in gender and race discrimination, as this Court readily acknowledged. See pp. 26-27, *supra*. "After Congress has legislated repeatedly in an area of national concern," such as combating race and gender discrimination in employment, "its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

And when Congress targets state action that is presumptively invalid—*i.e.*, state action that infringes on rights subject to heightened constitutional protection—this Court applies a deferential standard of review. *Hibbs*, 538 U.S. at 736. For example, in *Hibbs*, the Court upheld the family *medical* leave provisions of the FMLA as an appropriate means of enforcing the Fourteenth Amendment's prohibition against "gender-based discrimination," based on (a) the "persistence" of unconstitutional gender discrimination that still existed in 1993 (two years after GERA was enacted), (b) evidence of family *parental* leave policies largely from the *private* sector, and (c) evidence of state leave policies drawn from hearings on legislation proposed seven years earlier. *Id.* at 729-736; *id.* at 746-748 (Kennedy, J., dissenting); see also *Lane*, 541 U.S. at 528 (acknowledging that legislative evidence consisted largely of "parenting leave, little of which concerned unconstitutional state conduct"). The same result is warranted here.

Any review by this Court should await a case that squarely presents the issue, as well as further consideration of the question in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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